

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

MONDAY, THE 30TH OCTOBER 2006 / 8TH KARTHIKA 1928

CRL.A.No. 842 of 2001()

CC.369/1995 of JUDL.MAGISTRATE OF FIRST CLASS, KOYILANDY
.....

APPELLANT:

JOHNY, S/O.T.K.BALAKRISHNAN,
AGED 22 YEARS, RESIDING AT
THURUVAPPOYIL THAZHAKUNI HOUSE,
(P.O.) THOOVAKKODE,
(VIA) CHEMMANCHERRY,
KOZHIKODE DISTRICT.

BY ADV.SRI C.D.SHAJU,
P.M.MUHAMMED RIHAZ
SRI.K.RAKESH ROSHAN
SMT.THUSHARA.V

RESPONDENTS:

1. V.M.NARAYANAN,
S/O.CHOYILKUTTY,
VADAKKEMALAYIL HOUSE,
(P.O.)THOOVAKKODE,
(VIA) CHEMMANCHERRY
2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC
PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.M.P.JAYARAJ FOR R1
SRI.R.PARTHASARATHY
PUBLIC PROSECUTOR, SRI K.S.SIVAKUMAR FOR R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 30/10/2006, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J.M.JAMES, J.

Crl.A. No. 842 of 2001 (A)

Dated this the 30th day of October, 2006

J U D G M E N T

The son of the complainant is before this Court challenging the acquittal of the accused and dismissal of the complaint in C.C.No.369/1995, on the file of Judicial Magistrate of the First Class, Quilandy, on the ground, inter alia, that the service of the notice, as contemplated under clause (b) of proviso to Section 138 of the Negotiable Instruments Act, in short 'the Act', had not been complied with, by the appellant.

2. The complaint was preferred by the father of the appellant. He died during the period of filing of the appeal, after the complaint was dismissed. Now, on obtaining special leave of the court this appeal is filed by his son. The facts reveal that the first respondent borrowed an amount of Rs.35,000/- and, thereafter, in clearance of such debt, issued Exhibit P1 cheque dated 26/12/1994. When it was presented, it was dishonoured for want of sufficient funds, as seen from Exhibit P2

memo dated 28/12/1994. Exhibit P4 lawyer notice, dated 29/12/1994 was sent to the accused. He received it, as could be seen from Exhibit P5 postal acknowledgment card. The transaction was not settled and the debt amount not cleared. Therefore, the father of the appellant, preferred a complaint before the court below.

3. Two witnesses were examined and seven documents were marked on the side of the original complainant. No evidence was adduced by the accused. After appreciating the evidence, the court below found that the complainant has not fulfilled the pre-requisites for preparing the valid complaint. Therefore, passed an order of acquittal. Hence, this appeal.

4. I heard the arguments advanced by both sides. During the elaborate arguments, the learned counsel submitted that the entire amount was not due to the appellant. Therefore, I have suggested that an amount of Rs.22,500/-, be paid by the accused to the complainant. Accordingly, as prayed for by the counsel for the accused, the case was adjourned from 29/09/2006, the date of hearing, to 30/10/2006, giving one

month time for making payment. Thus, the case came up today.

5. The learned counsel for the first respondent-accused, submitted that the accused is not able to pay the amount and, therefore, the matter may be heard in detail. Heard both sides.

6. The learned Magistrate, in paragraph 9 of his judgment, came to a conclusion that:-

“on the factual aspects I find that Ext.P1 cheque was issued by the accused to the complainant to discharge his liability. From the evidence of PW2 and Ext.P2 and P7 it is clear that the cheque was dishonoured for want of sufficient fund in the account of the accused”.

7. Thus, the learned Magistrate, after perusing the evidence on record, came to a conclusion that Exhibit P1 cheque was issued for the clearance of the debt amount to the father of the appellant, and the cheque was dishonoured for want of sufficient funds. However, the learned Magistrate found that the date of receipt of the notice was not proved by the complainant and, therefore, clause (b) of proviso to Section 138

of the Act, has not been fulfilled. That was the sole reason why the complaint was dismissed and the accused acquitted.

8. I have perused Exhibit P5 postal acknowledgment card. The same had been signed by the accused as having received the notice therein. It is true that the postman has not filled up the date against the date of delivery column. But, I have perused the postal seal imposed on Exhibit P5. It contains the date as 10/01/1995. Exhibit P4 is the lawyer notice dated 29/12/1994. Exhibit P3 is the postal receipt. The postal seal on the reverse of the postal receipt, legibly shows that Exhibit P4 notice was sent on 29/12/1994. Thus, the postal date seal, found on Exhibit P5 Postal Acknowledgment Card as 10/01/1995 is the date on which the accused had received the same, as the signature in Exhibit P5 is admitted by him as his. Thus, the date of receipt of Exhibit P4 notice is on 10/01/1995.

9. The complaint was preferred before the lower court by the complainant on 02/02/1995. This fact is not disputed by the accused.

10. The position of law is that if the holder of the

cheque in due course sends a notice in writing to the last known correct address of the drawer of the cheque, unless the contrary is proved, it is to be presumed that the notice was duly served on the addressee. [See **Joseph Jose vs. Baby** (2002 (3) KLT SN Case No.64 at page 46) and **Madhu vs. Omega Pipes Ltd.**(1994 (1)KLT 441)]. In the case at hand, Exhibit P5 postal acknowledgment card, contains the legible signature of the accused. Thus, there is absolutely no dispute that he has not received Exhibit P4 lawyer notice. The postal seal in Exhibit P5, clearly shows the date as 10/01/1995. Thus, unless the contrary is proved, it is only to be accepted that the notice has been served on the addressee on 10/01/1995, and Exhibit P4 had been duly received by him. Therefore, the learned Magistrate was not legally correct in coming to a conclusion that, due to the non-filling of date of delivery in Exhibit P5, in the relevant column, the notice, Exhibit P4, was not given, as required under clause (b) of proviso to Section 138 of the Act. Hence, I hold that all the requirements under the Act had been fulfilled by the complainant and he also proved the case as required under the

Act. In such circumstances, I further hold that accused is guilty of the offence and, therefore, convict him under Section 138 of the Act.

11. The sentence has to be imposed on the accused after hearing the accused. Hence, I set aside the impugned judgment dated 22/11/2000. C.C.No.369/1995 is restored to the file of the Judicial Magistrate of the First Class, Koyilandi. For the limited purpose of hearing the accused and passing the sentence, as per the law, I remand C.C.No.369/1995 to the file of the court below.

12. The learned Magistrate shall procure the presence of the accused and proceed against him, as directed above. This shall be done within one month from the date of appearance/production of the first respondent-accused, before the Judicial Magistrate of the First Class, Koyilandi.

The appeal is allowed as above.

(J.M.JAMES)
Judge

ms

J.M.JAMES, J.

Crl.A. No. 842 of 2001 (A)

J U D G M E N T

30th October, 2006